In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Armour & Company, a corporation,
Plaintiff and Appellant,

vs.

Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California,
Defendant and Appellee.

BRIEF OF APPELLANT UPON APPLICATION FOR INJUNCTION PENDING APPEAL.

J. C. Macfarland,
Gibson, Dunn & Crutcher,
By J. C. Macfarland,
Banks-Huntley Bldg., 634 S. Spring St., L. A.,
Attorneys for Plaintiff and Appellant.

Ira C. Powers,
Of Counsel.

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STATEMENT.

The appeal is from an order of the District Court entered by the Honorable Paul J. McCormick, vacating a temporary injunction theretofore issued by the terms of which defendant and appellee was enjoined from collecting processing taxes assessed to plaintiff and appellant.

A transcript of the record is being prepared which contains all documents filed in the trial court. There is also attached to the petition for injunction pending appeal a copy of all documents filed in the District Court except

the praecipe, bond on appeal and petition for rehearing. The references in this brief to the supplement to the petition are designated as "Supp."

Plaintiff is engaged in the meat packing business and is a processor of hogs. The complaint was filed August 3, 1935. It appears at Supp. pp. 1 to 44. An injunction was sought against the collection of approximately sixteen thousand dollars ($16,000.00) of processing taxes assessed for the month of June, 1935, and also against any amounts which might be assessed for subsequent months. It was alleged that the Agricultural Adjustment Act, under which said assessments were being levied, was unconstitutional upon the grounds and in the particulars set forth in paragraph XVII of said bill [Supp. pp. 14 to 17]; that there were pending in the Congress of the United States certain proposed amendments to the Agricultural Adjustment Act which would have the effect of either defeating or substantially impairing any remedy which plaintiff possesses for the recovery of said taxes in the event said Agricultural Adjustment Act should be finally held to be unconstitutional [Supp. pp. 17 to 20]; and that the amendment before the Senate of the United States (which proposed amendment is set forth in paragraph XVIII, and which was then in a form somewhat similar to the amendment as it was subsequently passed) would have the effect of imposing onerous conditions which could not be complied with by plaintiff because the facts are incapable of ascertainment and that the right of refund therein provided was purely illusory and did

not constitute any adequate remedy at law or any remedy whatsoever. [Supp. pp. 19, 20.]

A temporary restraining order was issued, and upon the hearing of the application for temporary injunction, the trial court made and entered an order granting to plaintiff and appellant a temporary injunction. [Supp. p. 45.] Thereafter, and subsequent to the decision of this court in the case of *Fisher Flouring Mills Co. v. Vierhus,* No. 7938, defendant made a motion [Supp. p. 68] to vacate said injunction upon the ground, among others, that the decision of this court in that case made it mandatory upon the trial court to vacate the said temporary injunction. The motion of defendant was granted by the trial court, upon the sole ground that the said decision of this court in said case constituted a binding rule "intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes" under the Agricultural Adjustment Act [Supp. pp. 57, 58]. Thereafter, petitioner filed a petition for rehearing which was set for hearing on the 12th day of September, 1935, and which said petition was, at said time, denied by the court. [Supp. p. 92.]

On September 12, 1935, petitioner obtained leave of court to file the supplemental complaint, copy of which is attached to the petition. [Supp. pp. 50-56, 93.] It was alleged in said supplemental bill that Congress had passed, and the President had approved, amendments to the Agricultural Adjustment Act, which had the effect of depriv-

ing plaintiff of any remedy at law to sue for the refund of processing taxes. The amendments referred to are set forth in the petition, pages 8 to 10, and Supp., pages 50 to 54.

Upon application for injunction pending appeal, the trial court made its order [Supp. p. 63] to the effect that *such application should be presented to this court,* in view of its recent decision in the said case of *Fisher Flouring Mills v. Vierhus.*

An appeal has been taken from the said order vacating the temporary injunction. Copies of the order allowing an appeal and of the assignment of errors appear in the supplement, pages 63 and 76-88.

Brief or Summary of Argument and Statements of Points Relied on Upon This Application for Injunction Pending Appeal.

I. AN INJUNCTION PENDING APPEAL SHOULD BE GRANTED SO THAT THE FORCE AND EFFECT OF THE TEMPORARY INJUNCTION HERETOFORE GRANTED BY THE TRIAL COURT UPON PLAINTIFF'S APPLICATION MAY BE RESTORED, SAID INJUNCTION HAVING BEEN GRANTED UPON A SHOWING OF UNCONTRADICTED FACTS WHICH REQUIRED, AND WERE DEEMED BY THE TRIAL COURT TO REQUIRE, INJUNCTIVE RELIEF.

(a) The temporary injunction was granted by the trial court upon plaintiff's uncontradicted showing of facts entitling it to such equitable relief.

(b) The temporary injunction was vacated by the trial court not upon any showing of any change in

circumstances, but solely upon the ground that the decision of this court in *Fisher Flouring Mills Co. v. Vierhus,* rendered August 15, 1935, required the trial court to refrain from exercising its independent judgment, and to vacate the injunction; and upon the same ground the trial court refused to consider plaintiff's application for injunction pending appeal. Said decision, however, was based upon a dissimilar set of facts and upon a statute entirely different from that now governing claims for refunds.

(1) The decision in the *Fisher Flouring Mills Co.* case was based upon the "showing" then made and especially upon the petitioner's contention that it *had passed* the processing tax on to purchasers, whereas the present complaint and application shows that this petitioner has not, and cannot, pass such tax to the purchaser.

(2) The decision of the court in *Fisher Flouring Mills Co. v. Vierhus* was based upon the *refund law as it stood at that time* under which a claim for refund was not subject to the restrictions and limitations of the amendments to the Agricultural Adjustment Act, approved August 24, 1935.

II. Failure to preserve the status quo pending appeal would result in irremedial injury to petitioner, and in view of the fact that the questions presented by the appeal are matters upon which no direct authoritative precedent exists, and the solution of these questions, including that of the effect of the 1935 Amendments to the Agricultural Adjustment Act, is of great public importance, an injunction should be granted pending the appeal of this case; and this, irrespective of the court's present opinion of the merits of the appeal.

28 *U. S. C. A.,* Sec. 377;

Foster etc. v. Haydel, 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154;

Cotting v. Kansas City Stock Yards Co. (C. C. Kan.), 82 Fed. 850, 857;

Louisville & N. R. Co. v. Siler (C. C. Ky.), 186 Fed. 176, 203;

City of Pasadena v. Superior Court, 157 Cal 781, 790, 795.

III. An injunction pending appeal should be granted to petitioner for the reason that petitioner under the amendments to the Agricultural Adjustment Act approved August 24, 1935, has no plain, complete, or adequate remedy at law.

(a) Under the Agricultural Adjustment Act as amended August 24, 1935, petitioner's remedy at law is restricted and limited by the following requirements, among others:

(1) Claimant must establish to the satisfaction of the Commissioner of Internal Revenue

that claimant did not directly or indirectly include the amount of the claim in the price of the article or pass on "*any part* of such amount to the vendee or to any other person *in any manner*" or include "*any part* of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by *any part* of such amounts." Sec. 21 (d) (1).

(2) "In any judicial proceeding relating to such claim a transcript of the hearing before the Commissioner shall be duly certified and filed *as the record* in the case and shall be so considered by the court." Sec. 21 (d) (1).

(3) No suit for refund based on the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months *after* the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto. Sec. 21 (d) (2).

(4) Such claim must conform "to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe". Sec. 21 (d) (2).

(5) "No such suit or proceeding shall be begun before the expiration of *one year* from the date of filing such claim unless the Commissioner renders a decision within that time." Sec. 21 (d) (2).

(b) The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to obtain the ends of justice as the remedy in equity.

28 U. S. C. A., Sec. 384;

Cable v. U. S. Life Ins. Co., 191 U. S. 288, 303, 48 L. Ed. 188, 192;

Standard Oil Co. v. Atlantic Coast Line R. Co. (D. C. Ky.), 13 Fed. (2) 633, 637; aff. 275 U. S. 257, 72 L. Ed. 270;

Atchison, Topeka & Santa Fe R. Co. v. Sullivan (C. C. A. 8), 173 Fed. 456, 470;

Clark v. Pigeon River Imp. etc. Co. (C. C. A. 8), 52 Fed. 550, 557;

Munn v. Des Moines Nat. Bank (C. C. A. 8), 18 Fed. (2) 269, 271;

Nutt v. Ellerbe (Three-judge court, S. C.), 56 Fed. (2) 1058, 1063;

Union Pac. Ry. Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 1110, 1116;

Fredenberg v. Whitney (D. C. Wash.), 240 Fed. 819, 822, 823;

Magruder v. Belle Fourche Valley Water User's Association (C. C. A. 8), 219 Fed. 72, 79;

Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co. (C. C. S. D.), 156 Fed. 160, 167.

(c) The remedy provided by the Act as amended is not only not adequate, prompt or complete, but in practical operation will necessarily involve a multiplicity of suits.

Postal Cable Tel. Co. v. Cumberland T. & T. Co., 177 Fed. 726, 734 (C. C. Tenn.);

Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 111 Pac. 326, 327 (Okla.).

ARGUMENT.

I.

An Injunction Pending Appeal Should Be Granted So That the Force and Effect of the Temporary Injunction Heretofore Granted by the Trial Court Upon Petitioner's Application May Be Restored, Said Injunction Having Been Granted Upon a Showing of Uncontradicted Facts Which Required and Were Deemed by the Trial Court to Require Injunctive Relief.

(a) The Temporary Injunction Was Granted by the Trial Court Upon Plaintiff's Uncontradicted Showing of Facts Entitling it to Such Equitable Relief.

The facts alleged in plaintiff's complaint were not controverted in the District Court. Defendant's motion to dismiss the complaint was denied and his objections to the granting of a preliminary injunction were overruled. [Supp. p. 89.]

The showing as to the probable invalidity of the Act and of special facts from which it appeared that the remedy at law available to plaintiff did not furnish it prompt, complete, or adequate relief, that a multiplicity of suits would result, and that irreparable damage would be sustained by plaintiff was regarded as sufficient to warrant equitable relief under the cases of:

Dows v. City of Chicago, 11 Wallace, 108;

Hill v. Wallace, 66 L. ed., 822., 259 U. S. 44, 62;

Wilson v. Southern Railway Company, 68 L. ed. 456, 263 U. S. 574, 577;

Miller v. Standard Nut Margarine Co., 76 L. ed. 422, 284 U. S. 498, 509;

Lee v. Bickell, 292 U. S. 415, 78 L. ed. 1337. 1341.

That there is at least a serious doubt as to the constitutionality of the Act appears from the decision in *Butler v. U. S. A.,* (C. C. A. 1) decided July 13, 1935, II U. S. Law Week. 1064.

(b) The Temporary Injunction Was Vacated by the Trial Court Not Upon Any Showing of Any Change in Circumstances, But Solely Upon the Ground That the Decision in Fisher Flouring Co. v. Vierhus Required the Trial Court to Refrain From Exercising Its Independent Judgment, and to Vacate the Injunction; and Upon the Same Ground the Trial Court Refused to Consider Plaintiff's Application For Injunction Pending Appeal. Said Decision, However, Was Based Upon a Dissimilar Set of Facts and Upon a Statute Entirely Different From That Now Governing Claims for Refunds.

The District Court said, in its order vacating the temporary injunction, with reference to the decision in the *Fisher Flouring Mills Co.* case,

> "such authoritative control requires the granting of the motion to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered." [Supp. p. 58.]

Upon the same ground the District Court refused to consider appellant's application for an injunction pending appeal, or for a *supersedeas.* [Supp. p. 63.]

The decision of this court in the *Fisher Flouring Mills Co.* case was expressly *confined to the "showing" there*

made, and is clearly distinguished from the present case upon two main grounds:

(1) The decision in the *Fisher Flouring Mills Co.* case was based upon the petitioner's contention that it *had passed* the processing tax on to purchasers, whereas the present complaint and application shows that this petitioner has not, and cannot, pass such tax to the purchaser.

It is alleged in the complaint herein [Supp. pp. 12, 13]:

"That the plaintiff is *not able* to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture and also the existing processing tax of $2.25 for each 100 pounds live weight of hogs purchased by it; that more than fifty (50) separate and distinct products result from the processing of a hog, all of which products are sold by the plaintiff that, because of the nature of the business of purchasing and processing hogs and selling the resulting products it is *impossible* for the plaintiff or for any one else to ascertain what portion of the processing tax, payable because of the processing of any 100 pounds live weight of any hog, is assignable to the products resulting from such processing, in that in the normal course of business of the plaintiff, a hog is purchased on a given day, is processed the same or the next day and the products are sold as individual pieces from ten days to four months later, during which time the market prices at which such products are sold have been constantly and daily fluctuating; that said processing taxes paid and to become due and payable by plaintiff under said Act *cannot be recovered or recouped* by it as a result either of adding said tax to the

product or of subtracting the said tax from the price paid to the raisers of hogs, for the reason that hogs are bought and pork products are sold in competitive markets; that the price at which pork products can be sold in the market is determined, not only by competition from other packers, but also by competition which other food products give pork, by consumer demand and by the price which the consumer will pay."

The foregoing statements were not controverted in any manner before the District Court.

(2) The decision of the court in *Fisher Flouring Mills Co. v. Vierhus* was based upon the *refund law as it stood at that time* under which a claim for refund was not subject to the restrictions and limitations of the amendments to the Agricultural Adjustment Act, approved August 24, 1935.

The provisions of section 156 of Title 26 U. S. C. A. which governed the remedy of refund at the time the decision in the *Fisher Flouring Mills Co.* case was announced on August 15, 1935, unlike the amended Act now in force, placed no restraint as to the amount of such tax paid by the petitioner which could be recovered by it in the event the Act, pursuant to which such taxes were assessed, levied, and collected, should finally be held invalid; contained no requirements that it be proved that the tax had not been passed on in any manner; did not limit the record in the District Court to the record of the proceedings before the Commissioner; did not bar the filing of claims until the Act had been finally held invalid nor require that claim to be filed subject to any regulations thereafter to be prescribed or to any regulations; and did not postpone the right to sue until one year after the date of filing such claim.

II.

Failure to Preserve the Status Quo Pending Appeal Would Result in Irremedial Injury to Petitioner, and in View of the Fact That the Questions Presented by the Appeal Are Matters Upon Which No Direct Authoritative Precedent Exists, and in View of the Fact That a Solution of These Questions, Including That of the Effect of the 1935 Amendments to the Agricultural Adjustment Act, Is of Great Public Importance, an Injunction Should Be Granted Pending the Appeal of This Case, and This, Irrespective of the Court's Present Opinion of the Merits of the Appeal.

A denial by this court of this application for injunction pending appeal would have the effect of precluding any further prosecution of this appeal. The collector will proceed to enforce payment of the tax involved, so that the action will become moot. It will be impossible for plaintiff to obtain in this or any other proceeding a decision on the merits of the questions presented by the complaint.

In *Foster, etc. v. Haydel,* 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154 the trial court refused to grant a temporary injunction in an action by a packing company to enjoin the enforcement of a state statute which forbade the shipment of raw shrimp out of the state of Louisiana for the purpose of canning. The Supreme Court reversed the decree, saying:

> "If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. Pennsylvania v. West Virginia, *supra*; West v. Kansas Natural Gas Co., 221 U. S. 229, 255, 55 L. ed. 716 726, 35 L.

R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564. The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremediable loss if the challenged provisions shall be enforced, their right to have a temporary injunction is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

In *Cotting v. Kansas City Stock Yards Co.,* (C. C. Kan.) 82 Fed. 850, 857 the opinion was by Justice Thayer. A suit to enjoin the enforcement of a state statute fixing minimum charges was dismissed but an injunction pending appeal was allowed, the court saying:

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the supreme court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock-yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance, by the supreme court in Hovey v. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that

right. The court is of opinion that the cases at bar are of such moment, and the questions at issue *so balanced with doubt as to justify and require* an exercise of the power in question." (Italics ours unless otherwise noted.)

To the same effect is *Louisville & N. R. Co. v. Siler,* (C. C. Ky.) 186 Fed. 176, 203.

As stated in *City of Pasadena v. Superior Court,* 157 Cal. 781, 790, 795:

"In Polini v. Gray, L. R. 12 Chan. Div. 438, it is said by the master of the rolls: 'It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party is to reap the fruit of that litigation and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of the first instance before the first trial, and to the court of appeals before the second trial, as to the court of last instance before the hearing of the final appeal.'

* * * * * * * * *

"Common fairness and a sense of justice readily suggests that while plaintiffs were in good faith prosecuting their appeals, they should be in some manner protected in having the subject-matter of the litigation preserved intact until the appellate court could settle the controversy."

City of Pasadena v. Superior Court, 157 Cal. 781, 790, 795.

III.

An Injunction Pending Appeal Should Be Granted to Petitioner for the Reason That Petitioner Under the Amendments to the Agricultural Adjustment Act Approved August 24, 1935, Has No Plain, Complete, or Adequate Remedy at Law.

(a) The Provisions of the Recent Amendments to the Agricultural Adjustment Act Affecting Suits for Refund Limit and Restrict the Remedy at Law in Several Important Particulars.

(1) Claimant must establish to the satisfaction of the Commissioner of Internal Revenue that claimant did not *directly or indirectly* include the amount of the claim in the price of the article or pass on "*any part* of such amount to the vendee or to any other person in *any manner*" or include "*any part* of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by *any part* of such amount." Sec. 21 (d) (1).

(2) "In any judicial proceeding relating to such claim a transcript of the hearing before the Commissioner shall be duly certified and filed *as the record* in the case and shall be so considered by the court." Sec. 21 (d) (1).

(3) No suit for refund based on the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto. Sec. 21 (d) (2).

(4) Such claim must conform "to such regulations as the Commissioner of Internal Revenue with

the approval of the Secretary of the Treasury, may prescribe." Sec. 21 (d) (2).

(5) "No such suit or proceeding shall be begun before the expiration of *one year* from the date of filing such claim unless the Commissioner renders a decision within that time." Sec. 21 (d) (2).

(1) The requirement that the claimant must establish to the satisfaction of the Commissioner of Internal Revenue that claimant did not *directly or indirectly include* the amount of the claim in the price of the article or *pass on "any part* of such amount to the vendee or to any other person in *any manner"* in effect, deprives petitioner of all remedy at law.

This result is not due to any fault of petitioner, but arises from the fact that the law provides no criterion for the determination of the indirect incidence of the tax. The factors involved in the determination of this question can only be presented by a month by month showing of the circumstances of each purchase and each sale in the course of petitioner's business.

As pointed out in the Complaint [Supp. pp. 12, 13] in the Supplemental Complaint [Supp. pp. 51, 52] and in the Petition [pp. 11 to 17] plaintiff is unable to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture together with the amount of the processing tax. More than 50 separate products result from the processing of a hog, and because of the nature of the business of purchasing and processing hogs and selling the resulting products it is impossible for plaintiff or any one else to ascertain what portion of the processing tax payable upon the

processing of the hog is assignable to the products resulting therefrom.

It is impossible to segregate the item of processing taxes and determine to what extent, if any, the sales price of pork products is affetced by said tax. The tax is paid on the live weight of the hog. Immediately upon such processing the hog is converted into numerous different articles, each of which is affected by separate and distinct market trends and conditions, and subject to continual fluctuations over periods of time, varying in length with each article, but running from a period of a few days to several months. Upon conversion into said articles the commodity loses its identity. The prices obtained by petitioner on the sale of said articles or products are determined by competition in the open market with the products of other packers and also with other food products. These prices fluctuate daily and over a wide range. The determination of the extent to which the purchase price obtained by petitioner might constitute or be properly held to constitute a portion of the processing tax theretofore paid by petitioner would involve the consideration of factors which it is impossible for petitioner to establish by proof, even though petitioner keeps the most accurate and complete records which the situation permits. Even if the price obtained by petitioner upon the sale of the articles converted from any particular hog could be determined—and as shown in the petition the same is impossible of ascertainment—the problem would still remain of determining what portion of the sale price so obtained is to be allocated to the reimbursement of the tax to petitioner, and what portion, if any, to petitioner's costs other than by reason of said tax. The provision of the Act by which it is required that petitioner in order to obtain a refund

must establish facts not susceptible of proof, or even conjecture, renders the purported remedy entirely illusory, arbitrary, unreasonable and inadequate.

Under the amended Act petitioner would not be entitled to a refund of any portion of the tax paid if "any part of such amount" has been passed on to the vendee, so that petitioner, in order to clearly establish a claim for refund, would, apparently, be required to show that no consideration whatever was obtained on sale of its products. Despite the fact that petitioner has not passed the tax to the vendee, and in fact has suffered a loss of several thousand dollars monthly for several months past in the operation of its hog business, it will, nevertheless, be unable to recover back the amount of any tax illegally levied.

The provisions of Section 156 of Title 26 of U. S. C. A., which applied to claims such as petitioner's prior to the amendment of August 24, 1935, placed no restraint whatsoever as to the amount of illegal tax paid by petitioner which could be recovered by it nor was there any requirement that plaintiff prove that the tax had not been passed on directly or indirectly to the vendee or to any other person in any manner.

The requirement imposed by the Act in this respect goes far beyond any provision of any previous statute.

In the case of *United States v. Jefferson Electric Manufacturing Co.,* 78 L. Ed. 859, 868, 871, 291 U. S. 386, 394, 402 (relied upon by appellee), the court held that the automobile accessory manufacturers' excise tax refund provision did not constitute a lack of *due process.* No question of the relative adequacy of legal and equitable remedies was involved. The provision of Section 424 of the Excise Tax Act involved in that case merely required

that the claimant establish "that such amount was not collected directly or indirectly from the purchasers." In the present Act the right to a refund is subject to the further requirements in this respect that the tax shall not have been included in the price "of any article processed from the commodity with respect to which it was imposed" and the claimant must show that he has not "passed on any part of such amount to the vendee or to any other person in any manner." He must also show "That the price paid by the claimant * * * was not reduced by any part of such amount." The Excise Tax Act further expressly provided, unlike the Agricultural Adjustment Act as amended, for the substitution of a bond in lieu of proof that the claimant had himself borne the burden of the tax. The tax involved in that case was upon the identical articles sold and not upon some other commodity from which the said articles had been converted. Likewise, the Excise Tax involved was made to take effect upon the very act of sale of the articles and not upon some prior transaction respecting some commodity from which these articles had subsequently been converted. The manufacturer therefore was not beset with the difficulties presented by the processing tax and was in a position to readily show whether the tax arising upon the sale had actually been borne by himself or by the purchaser; nor was the right to refund of the entire tax prejudiced or defeated by failure to prove that some part of the tax had not been collected from the purchaser.

Obviously there was nothing arbitrary in the requirement of that Act that the manufacturer either prove that he had not collected the tax from the purchaser or give a bond to reimburse the purchasers. The case is no authority for the contention that the existence of a right of re-

covery, even under the provisions of that Act, should stay the hand of equity in enjoining the enforcement of exactions of taxes, the validity of which is questioned. Certainly no case has gone so far as to hold that equity will consider as adequate a remedy at law which is subject to the drastic limitations of the Agricultural Adjustment Act as amended; and any such ruling would be directly contrary to the well established rule of prior decisions that the remedy at law in order to deprive equity of jurisdiction must be adequate, speedy, plain, and complete, and not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation or is not as efficient to the ends of justice or to its prompt administration as the remedy in equity. (See cases discussed under point (b) *infra.*)

As set forth in plaintiff's complaint, the original bill amending the Agricultural Adjustment Act as passed by the House of Repreesntatives took away entirely the right of a processor to recover taxes illegally collected. It is evident from a consideration of the operation of the amendment as finally passed that while it does not purport to take away entirely the remedy of the processor, it will in actual operation have that effect. If the Act had gone through as originally proposed it would have been unconstitutional as an attempt to cure an illegal and unauthorized tax by denying all remedy to the taxpayers. (*Graham v. Goodcell,* 282 U. S. 409, 430, 75 L. Ed. 415, 441.) The amendment as passed, is calculated to reach the same result by presenting such substantial and, in fact insuperable, obstacles that the nominal remedy is not actually available or effective.

(2) The provision that in any judicial proceeding relating to the claim for refund "a transcript of the hearing

before the Commissioner shall be duly certified and *filed as the record* in the case and shall be so considered by the court" (Sec. 21(d), Subdivision(1)), is such a limitation on the remedy at law as to constitute the same wholly inadequate.

The constitutional questions which arise under the Act as amended are questions which the claimant is entitled to present before a court which is empowered to hear any and all competent evidence, and which is not limited to the review of evidence before some inferior tribunal.

In *Chicago, B. & Q. R. Co. v. Osborne,* 265 U. S. 14, 16, 68 L. Ed. 878, 880, the court held that a provision for a writ of error to the Supreme Court of the state to review the record of a board of equalization is not an adequate remedy. The court said:

> "When such a charge as the present is made, it can be tried fully and fairly only by a court that *can hear any and all competent evidence,* and that is not bound by findings of the implicated board for which there is any evidence, always easily produced."

(3) The provision that no suit for refund under the Agricultural Act as amended based upon the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months *after* the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto (Sec. 21(d) (2)), renders such remedy uncertain and inadequate.

It is doubtful, under this provision, whether claimant could, at the present time, file any claim or initiate any proceeding for the recovery at law of any tax paid by it. Apparently the initiation of such action must await a deci-

sion of the Supreme Court by which the Agricultural Adjustment Act as amended is finally held invalid. This uncertainty as to the availability, at present, of the remedy provided, is sufficient alone to give equity jurisdiction of the present action under the cases discussed under point (b) *infra.*

(4) The provision that any claim filed for refund must conform "to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe" (Sec. 21 (d) (2)), in view of the fact that, as stated in the petition, no such regulations have been prescribed [Supp. p. 55], renders the remedy at law inadequate.

As stated in the case of *Fredenberg v. Whitney* (D. C. Wash.), 240 Fed. 819, 822, 823:

> "In these days of industrial expansion, parties should have a *right to have any issue which involves their financial status speedily adjusted,* and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the *party himself controls and can assert at the moment.*"

(5) The provision that no suit or proceeding shall be begun on any claim before the expiration of *one year* from the date of filing such claim unless the Commissioner renders a decision within that time (Sec. 21 (d) (2)) presents a further limitation upon the legal remedy which, in view of the facts of this case, renders the legal remedy inadequate.

The limitation prescribed by Section 156 of Title 26, U. S. C. A., which was applicable to all such refund claims prior to August 24, 1935, was six months. The extension

of such period for an additional period of six months, in view of the multiplicity of issues necessarily presented by a claim for refund by petitioner, and the vast amount of detailed evidence necessary to present a claim for each month of the year, renders the remedy provided so inadequate and impracticable as to warrant the interposition of equity.

(b) The Rule Is Well Settled That a Court of Equity Is Not Deprived of Jurisdiction to Grant Injunctive Relief Where the Remedy at Law Is Not Equally Plain, Speedy, Complete or Practical, and as Efficient to Attain the Ends of Justice Both in Respect of the Final Relief Sought, and the Mode of Obtaining It, as Is the Relief in Equity.

In *Cable v. U. S. Life Ins. Co.,* 191 U. S. 288, 303, the court said at page 303 (192):

> "It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to *without impediment created otherwise than by the act of the party,* and the remedy of defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, *arising other than by reason of its own act.*"

In *Standard Oil Co. v. Atlantic Coast Line R. Co.* (D. C. Ky.), 13 Fed. (2) 633, 635, 636, 637; aff. 275 U. S. 257, 72 L. Ed. 270, the court held that equity could assume

jurisdiction of an action to enjoin a railway from charging excess freight over reasonable charges and for accounting for past excess charges. The Court said:

> "It is well settled, however, that, to constitute an adequate remedy at law, the remedy must be as complete, practicable, and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity. ***
>
> "No recovery could be allowed a plaintiff in such an action until he had established to the satisfaction of the jury, not only that the rates charged were unreasonable, but the *extent* of their unreasonableness. ***
>
> "So it is extremely doubtful if a remedy at law which throws upon the plaintiff the burden of proving that rates charged are unreasonable, and leaves to a jury the decision of such a question, is as full, practicable, complete, and efficient, either as to the final relief or the method of obtaining it, as is an equitable remedy which imposes no such burden upon the plaintiff. ***
>
> "So, in trying to enforce in this court its common-law right of action, the plaintiff would be confronted with *substantial obstacles, with which it is not confronted in this equity action.*"

In *Atchison, Topeka & Santa Fe R. Co. v. Sullivan* (C. C. A. 8), 173 Fed. 456, 470, the court held equity had jurisdiction of suit to enjoin collection of a state tax based on illegal discrimination. The Court said:

> "The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as *certain, complete, prompt, and efficient* to attain the ends of justice as the remedy in equity. (Citing cases.)

> The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the $3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is *neither as prompt, nor as certain, nor as complete,* as the relief which may be granted through this suit in equity."

In *Clark v. Pigeon River Improvement etc. Co.* (C. C. A. 8), 52 Fed. (2) 550, 557, the Court said:

> "Section 267 of the Judicial Code (Title 28, U. S. C. A., §384) provides that suits in equity shall not be sustained in United States courts where there is a plain, adequate, and complete remedy at law. That remedy, however, must be one that is adequate, speedy, plain, and complete, *not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation* to accomplish the purposes of justice."

In *Munn v. Des Moines Nat. Bank* (C. C. A. 8), 18 Fed. (2) 269, 271, the Court held that the remedy offered

for review of excessive assessments of capital stock, in view of the shortness of time allowed for presenting objections which was occasioned by assessors' delay in completing assessment books, was "not only inadequate but *necessarily impractical and futile.*" The Court said:

> "The adequate remedy which will prevent the maintenance in this court of equity of these suits must be 'as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

In *Nutt v. Ellerbe* (Three-judge court, S. C.), 56 Fed. (2) 1058, 1063, the Court held that a truck owner had no adequate remedy at law with respect to state tax on trucks, no provision being made for interest. The Court said:

> "It has been repeatedly held that the remedy at law must be plain and where there is doubt about it the taxpayer is not required to speculate and take the chances of being able to recover at law."

In *Union Pac. Ry. Co. v. Weld County,* 247 U. S. 282, 285, 62 L. Ed. 1110, 1116, the Court held that injunctive relief against the collection of taxes should not be denied on the ground that an adequate remedy at law exists under the Colorado statute, where the absence of a decision by a court of that state on the effect of an amending statute leaves it uncertain whether the approval of the state tax commission is required or whether in some instances the right to refund is withdrawn.

The Court said, after referring to decisions under the earlier statute:

> "If that section is still in force, *unqualified and unmodified,* the conclusion below that in this case there

is a plain, adequate, and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions.

* * * * * * * * *

"And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is *involved in uncertainty, an essential element of the requisite remedy at law is wanting*; for, as this court has said: 'It is a settled principle of equity *jurisprudence* that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit . . . Where equity can give relief, plaintiff ought not to be compelled to *speculate upon the chance of his obtaining relief at law.*' "

The legal remedy is not adequate unless it is under the control of plaintiff and can be asserted *at the moment.*

In *Fredenberg v. Whitney* (D. C. Wash.), 240 Fed. 819, 822, 823, the court held that a legal defense in an action to enforce penalties for failure to pay license fees was not so adequate as to exclude equity jurisdiction. The court said:

"In order to be adequate, the remedy at law must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as a remedy in equity. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. The Supreme Court of the United States, in *Ex parte* Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, held that a suit by stockholders against the corporation to enjoin the directors and officers from complying with the provisions of a state statute,

alleged to be unconstitutional, was properly brought within the equity rule of the court. This was a case where the Minnesota rate law was in question. It was contended that there was an adequate remedy at law, for that the officers could make defense when they were arrested and brought to the bar of the court. The court held that it would not be equal protection to an individual to allow him to come into court and make his defense upon condition that, if he fails, the penalty would subject him to imprisonment, or to extravagant and unreasonable loss. The law, under such circumstances, would impose such conditions as would work abandonment of individual rights, and such a gross hardship as would deny a speedy and adequate remedy at law, especially when penalties are so enormous as to deter a person from asserting a constitutional right and jeopardizing his liberty, or resulting in great loss of property. In Barber v. Barber, 21 How. 591, 16 L. Ed. 226, and Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82, the Supreme Court has held, in effect, that the remedy, to be adequate, must, to the chancellor, in exercising sound discretion, appear to be as plain, practical, efficient, and speedy as the remedy in equity, in order to decline jurisdiction; and that the legal remedy, both in respect of the final relief and the motive of attaining it, must be as efficient in law as in equity, was held by the same court, in Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005, and unless it appears that the *legal remedy is neither obscure or doubtful as to its adequacy or completeness*, the chancellor should not decline to extend the equitable arm of the court.

" 'Adequate remedy at law,' in Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22, is said to be a remedy

vested in the complainant, to which he may at all times *resort at his own option, fully and freely, without let or hindrance*; and in Bank v. Stone (C. C.) 88 Fed. 383, at page 397, the court said:

"It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. A remedy at law cannot be adequate, if its adequacy depends upon the will of the opposing party.'

"In these days of industrial expansion, parties should have a *right to have any issue which involves their financial status speedily adjusted,* and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the *party himself controls and can assert at the moment.* When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, *that doubt should be resolved in favor of the petitioners.*"

In *Magruder v. Belle Fourche Valley Water User's Association* (C. C. A. 8), 219 Fed. 72, 79, defendants were enjoined from exacting from plaintiff's alleged illegal water charges. Decree affirmed. The court said:

"But the remedy at law which precludes relief in equity *must be as prompt,* efficient, and adequate as the remedy in equity. To determine the amounts of the unauthorized charges for operation and maintenance may and probably will require the examination of the accounts of the receipts and disbursements on account of the entire project. To determine the amounts, if any, owing by the shareholders, may and probably will require the examination of the accounts between each of the complaining shareholders

and the project. The consideration and settlement of issues dependent upon the taking of accounts composed of many items is one of the great heads of equity jurisprudence, and the probable necessity for such an accounting is in itself sufficient to sustain the jurisdiction of this suit by a court of chancery."

In *Jewett Bros. & Jewett v. Chicago M. & St. P. Ry. Co.* (C. C. S. D.) 156 Fed. 160, 167, it was held that equity would take jurisdiction of an action to enjoin a railroad from putting into effect a proposed rate which was alleged to be unlawful, the remedy at law to sue for refund being inadequate. The court said:

"It also seems clear that complainant has no plain, speedy, and adequate remedy at law. In these days of fierce business competition a difference of a fraction of a cent in a freight rate may mean to the jobber or wholesaler success or failure in business. The damages which a shipper will suffer from an unjust or discrmininatory freight rate is not the mere difference between a reasonable and just rate and an unreasonable and unjust rate. The putting in of an unjust rate or an unjustly discriminatory rate may, in addition to the damage caused by the payment of the rate itself, cause business ruin. Must the shipper when notice is given that a carrier intends to put in effect an unjust rate or an unjustly discriminatory rate which the shipper knows will ruin his business *sit still, and let the rate go into effect,* and then complain to the Interstate Commerce Commission, which after three or four years may decide the rate to be reasonable or unreasonable? (Citing cases.) And if the shipper is successful in his contention, he may then with business ruined

go into court to enforce the award of the commission and at the end of three or four years more collect his damages, not those arising from the ruination of his business, but merely the excess paid by him over and above a reasonable rate. There is no plain and adequate remedy in such a proceeding. Courts of equity have often in similar cases enjoined the putting in effect of unlawful rates. (Citing cases.) Also the numerous cases in which courts of equity have enjoined unlawful rates sought to be enforced by state authorities."

(c) The Remedy by the Act as Amended is Not Only Not Adequate, Prompt or Complete, But in Practical Operation Will Necessarily Involve a Multiplicity of Suits.

Under the Act as amended, petitioner will be required to file a claim for refund for each month's tax paid and such claim upon rejection will give a right of action thereon. Whether such actions be brought singly or in groups, the difficulty of the situation as it affects the claimant will be the same. It must prove separately as to each month the amount of tax paid and the circumstances of each purchase and sale during this taxable period. The disadvantage of multiple actions would not be mitigated in the least by delaying action until the causes of action had accumulated or until the end of the statutory period. In any view of the Act as amended the petitioner is remitted to the choice between utterly ruinous delay and engaging in repeated and prolonged litigation only slightly less ruinous. Such a remedy is not, under any of the authorities, an adequate, prompt or complete remedy.

In *Postal Cable Telegraph Company v. Cumberland T. and T. Co.*, 177 Fed. 726, 734 (C. C. Tenn.), the tele-

phone company was enjoined from charging increased rates to a telegraph company. The court said, at page 734:

> "As to the defendant's argument that the complainant has a plain and adequate remedy at law, I am of opinion that in view of the continuing nature of the demand made by the defendant and the multiplicity of suits to which complainant would have to resort to enforce its rights, if it should pay the increased rate and sue to recover the same, the remedy at law would not be complete and adequate, and equity therefore has jurisdiction."

In *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.,* 111 Pac. 326, 327, (Okla.) the court said:

> "The aid of equity may be invoked to stay a wrong, when relief at law would occasion a multiplicity of suits. In Johnson *et al* v. Swanke, 128 Wis. 68, 107 N. W. 481, 8 Am. & Eng. Ann. Cas. 544, this rule is stated that the prevention of a multiplicity of suits as a ground for equitable jurisdiction applies where one party may be sued several times in relation to the same subject-matter in its entirety, or in respect to some element or elements thereof. See, also, Threlkeld v. Steward *et al.,* 24 Okl. 462, 103 Pac. 630. The ultimate criterion is in the utter inadequacy of the legal remedy. With said contract rescinded, the gas bills for both fuel and light would have to be paid monthly, running over a period of years, necessitating the plaintiffs bringing a multiplicity of suits to recover the money paid therefor as to the time the gas was to be furnished free, and the excess for the period it was to be supplied at a reduced price. * * *
>
> "* * * but, as before stated, it is not necessary to determine whether an injunction was the

> proper remedy on this theory, for it is clearly invokable to prevent a multiplicity of suits to redress, you might say, monthly breaches of a contract extending over a period of years."

Even though it may be said that the refund remedy provided by the Act does not necessarily result in a multiplicity of actions in the technical sense, it is obvious that the vast labor and expense of preparing and prosecuting twelve suits yearly and preserving, collecting, and presenting the evidence necessary to maintain them is not lessened in the least by consolidating the twelve claims in one action. The difficulties presented by each suit would be the same whether the suits were prosecuted singly or as "a bundle of suits."

The effect of the recent amendments to the Agricultural Adjustment Act is to multiply the difficulties of a refund suit both by its novel requirements of proof of the circumstances of each purchase and sale and by the enforced delay in the institution of the original proceedings and also in the prosecution of the claim.

The ultimate criterion of the propriety of equitable relief is undoubtedly the adequacy of the legal remedy; and a remedy the present availability of which is doubtful, which is uncertain, impractical, cumbersome, and the exercise of which is bound to be costly to a prohibitive degree, fraught with ruinous delay, and with the continuous hardship of prosecuting twelve refund claims annually, is not that plain, complete, and adequate remedy which will stay the hand of equity.

Conclusion.

The present case, therefore, presents those extraordinary and exceptional circumstances which render Section 3224, Revised Statutes, inapplicable. (*Miller v. Nut Margarine Co.*, 284 U. S. 498, 509.) The appeal presents novel and important questions of law the prompt determination of which is essential for the public interest. Petitioner will not be able to obtain a final determination of these questions unless an injunction pending the appeal is granted. Defendant will not be injured by the preservation of the *status quo* of the subject matter pending appeal if adequate provision is made to secure the amounts assessed. It is earnestly submitted that the circumstances of the present case are such as to justify and require the exercise of the equitable power of this court.

All of which is

Respectfully submitted,

J. C. Macfarland,
Gibson, Dunn & Crutcher,

By J. C. Macfarland,

Attorneys for Plaintiff and Appellant.

Ira C. Powers,
Of Counsel.